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No. 95-184

In the Supreme Court of the United States

OCTOBER TERM, 1995

TOM SHAW, INC., PETITIONER

v.

TOGO WEST, SECRETARY OF THE ARMY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly found: (a) that the facts of this case and the specific terms of petitioner's fixed-price contract with the government precluded further recovery by petitioner, pursuant to a termination of the contract for the convenience of the government; and (b) that the contract contemplated evidence of actual, rather than estimated, costs in support of such recovery.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1) is not reported, but the decision is noted at 41 F.3d 1520 (Table). The opinion of the Corps of Engineers Board of Contract Appeals (Pet. App. 1-148) is reported at 93-2 BCA ¶ 25,742.

JURISDICTION

The judgment of the court of appeals was entered on November 14, 1994. The petition for a writ of certiorari was filed on February 13, 1995 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner entered into a contract with the United States Army Corps of Engineers (government or Corps) calling for repairs to a breakwater in Point Judith, Rhode Island. The contract was a fixed-price type construction contract with an initial contract price of $2,304,249.40. Pet. App. 2-3.[1] A bilateral modification executed during performance reduced the contract price to $2,274,749.40.

The contract called for both minor and major repairs to an existing breakwater between the Atlantic Ocean and Block Island Sound. The "minor" repairs consisted of placement of stones along both sides of the existing breakwater structure. Pet. App. 4. The "major" repairs required rebuilding several complete voids in the existing breakwater. Placement of the stones in such a breakwater "approaches an art." *Id.* at 6. As the Corps of Engineers Board of Contract Appeals (ENGBCA) explained, "[t]he principal challenge is to evaluate the holes to be filled, to visualize the best stones * * * available * * *, and to manipulate the stones so that they achieve optimum interlocking." *Ibid.* The contract specifications illustrated this process by describing various acceptable stone shapes, placements, and tolerances. *Id.* at 6-7.

The contract included a number of standard government contract clauses, including a "Termination for Convenience of the Government" clause. Pet. App. 3.

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[1] Types of government contracts include fixed-price contracts, which establish the price in advance, see 48 C.F.R. Subpt. 16.2, and cost-reimbursement contracts, which estimate total costs but pay on an incurred-cost basis, see 48 C.F.R. Subpt. 16.3.

Under that clause, if the government terminates the contract for convenience, the contractor is entitled to payment for the work performed prior to termination and a fair and reasonable profit on that work. *Id.* at 132-134. This payment is subject to the limitation that the total sum paid to the contractor during performance and at termination cannot exceed the total contract price. *Id.* at 132, 134.

With regard to changes that required an "adjustment in contract price," the contract included a provision, Clause SP-33, that identified a manual containing a standard equipment cost schedule. That schedule was to be used to ascertain estimated equipment costs in connection with contract price adjustments "[w]henever actual ownership and operating costs for each piece of equipment or equipment groups of similar serial and series cannot be determined by the Contracting Officer from a contractor's accounting records." Pet. App. 54. For marine equipment, the schedule did not include specified costs, but described a methodology for determining the ownership expense of such equipment when it could not be ascertained from the contractor's accounting records. *Id.* at 57.

2. Petitioner's initial work in stone placement was rejected by the Corps as unacceptable. Pet. App. 12. In response to complaints by petitioner that the existing voids on the seaward side of the breakwater were too small to accommodate the replacement stones, the Corps altered the centerline of the planned configuration by about 2-1/2 feet to the seaward side. This had the effect of allowing more space for petitioner to fill the holes on the seaward side and eliminating construction of a planned

new slope on the harbor side of the breakwater. *Id.* at 16-17.

A subcontractor retained by petitioner briefly performed some satisfactory work in placing stones on the breakwater, but, after termination of that subcontractor by petitioner, petitioner continued to be unable acceptably to place stones on the project. Pet. App. 23-24. The parties held a series of meetings and exchanged voluminous correspondence regarding the progress of work. At one of those meetings, petitioner requested either additional funding of petitioner's continued performance through formal changes to the contract or a termination for the convenience of the government. *Id.* at 29.

The Corps' contracting officer then terminated petitioner's right to proceed for the convenience of the government. Pet. App. 29. In response to the termination, petitioner submitted a settlement proposal and a certified claim seeking $9,175,285.28 in costs, profits, and settlement expenses for itself and $2,131,896.88 for its suppliers. *Id.* at 33.[2] More than 20 meetings were held between representatives of petitioner and the government, in an effort to agree upon final compensation for the convenience termination. A series of payments was made by the government to petitioner, reflecting partial agreements

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[2] The jurisdictional scheme of the Contract Disputes Act of 1978, 41 U.S.C. 601 *et seq.*, requires a contractor to file a certified claim with the contracting officer. Upon full or partial denial of that claim, the contractor can pursue a *de novo* proceeding before an agency board or in the United States Court of Federal Claims. Appeals from either forum may be taken to the United States Court of Appeals for the Federal Circuit.

reached during those negotiations. *Id.* at 34-35. The total paid to petitioner during the performance and settlement periods eventually exceeded the adjusted contract price of $2,274,749.40. Petitioner continued to assert its entitlement to additional costs in excess of $10 million, but the contracting officer granted no further relief.

3. Petitioner appealed to the ENGBCA, which held a three-day hearing in Michigan and a ten-day hearing in Boston, Massachusetts. Petitioner had filed a number of separate claims with the contracting officer, alleging various grounds for increasing the contract price. All of those claims were consolidated and considered in the single appeal to the ENGBCA.

The ENGBCA issued a detailed opinion, in which it rejected all of petitioner's claims for further payments (with the exception of certain Contract Disputes Act interest not at issue here). The ENGBCA held that the "Termination for Convenience of the Government" clause precluded recovery in excess of the contract price unless petitioner proved a basis for increasing the contract price, Pet. App. 88, and found that petitioner had failed to meet that burden, *id.* at 101-102. The ENGBCA considered and rejected each of the alleged changes in performance that petitioner maintained mandated an increase in the contract price. *Id.* at 53. It also held that under Clause SP-33 of the contract, petitioner's recovery for marine equipment was properly based on its actual book figures rather than on the estimated costs schedule. *Id.* at 104.

4. Petitioner appealed to the United States Court of Appeals for the Federal Circuit, which summarily

affirmed the ENGBCA's decision without opinion. Pet. App. 1.

ARGUMENT

The court of appeals properly rejected petitioner's challenge to the factual findings and legal conclusions of the ENGBCA. The ENGBCA correctly found that the facts of this case and the specific terms of petitioner's contract precluded further recovery of costs by petitioner. The ENGBCA also correctly found that the contract contemplated submission of actual, rather than estimated, cost evidence. No basis existed for the court of appeals to disturb those findings.

1. The standard termination clause included in the government contract in this case provides that, upon a termination of the contract for the convenience of the government, the contractor shall receive certain costs, but that those costs "shall not exceed the total contract price." Clause GP-18(d) (Pet. App. 132). See also 48 C.F.R. 49.207 (when fixed-price contracts are terminated for convenience, the "[t]otal amount payable to the contractor for a settlement * * * must not exceed the contract price less payments otherwise made or to be made under the contract").

Petitioner does not dispute the general validity of the clause establishing the contract price as a ceiling,[3] but advances two arguments in support of its

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[3] Petitioner asserts, without explanation, that "[a] termination for the Government's convenience converts a fixed price contract to a cost reimbursable contract." Pet. 24. The meaning of that assertion is not clear. There are parallels between the payments due a contractor under a fixed-price contract terminated for convenience and a cost-reimbursement contract, but in neither case is recovery unlimited. Thus, under the Federal Acquisitions Regulations, the government's termina-

contention that the ceiling should be disregarded in this case: (a) that an assortment of alleged changes in the conditions of performance mandate that the contract price be raised, Pet. 2-4, 14-16, 31; and (b) that the ENGBCA's "evaluation of [p]etitioner's work product was improper," Pet. 34.

a. There are a variety of circumstances that can result in an increase in the price of a government contract, including defective specifications, government-caused delays, or constructive changes. If such circumstances are established by a contractor and shown to have caused costs to be incurred prior to the termination of the contract, they can effectively raise the contract price ceiling on a contractor's termination-for-convenience recovery. Pet. App. 88. Petitioner urged a number of such circumstances below, and repeats some of those assertions here.

The ENGBCA exhaustively addressed the grounds argued by petitioner as having constructively increased the contract price ceiling. For example, the facts regarding the shift of the centerline (which petitioner argues would have increased costs by causing more work to be done on the seaward, rather than harbor, side of the breakwater, Pet. 2-4, 32) were described in detail and documented by the ENGBCA.

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tion for convenience of a fixed-price contract entitles the contractor to be "compensate[d] * * * fairly for the work done and the preparations made for the terminated portions of the contract." 48 C.F.R. 49.201(a). But "[t]he total amount payable to the contractor * * * must not exceed the contract price." 48 C.F.R. 49.207. Likewise, a cost-reimbursement contract "provide[s] for payment of allowable incurred costs" but "establish[es] a ceiling that the contractor may not exceed." 48 C.F.R. 16.301-1.

E.g., Pet. App. 39-44, 96-97.[4] Because the centerline shift did not raise the cost of contract performance, however, the ENGBCA properly held that it could not result in an increase of the contract price ceiling. *Id.* at 96-97.

The high burden on a party attempting to overturn the factual findings of an agency board of contract appeals is established by statute and supported by a number of authorities. See 41 U.S.C 609(b); *United States* v. *Boeing Co.*, 802 F.2d 1390, 1393 (Fed. Cir. 1986); *Erickson Air Crane Co. of Washington, Inc.* v. *United States*, 731 F.2d 810, 814 (Fed. Cir. 1984); *Jefferson Constr. Co.* v. *United States*, 368 F.2d 247, 252 (Ct. Cl. 1966). The court of appeals' determination not to disturb the factual findings in this case was plainly justified and fully in accord with governing principles.

b. Petitioner's extended discussions of the ENGBCA's evaluation of its performance and whether a contractor's termination-for-convenience recovery may be reduced when the contractor is in a loss position on the contract, *e.g.*, Pet. 9, 12-13, 21, 29-

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[4] Specifically, the ENGBCA found that (i) the shift of the centerline did not cause petitioner to perform additional work on the seaward side of the project prior to the termination, Pet. App. 40; (ii) petitioner's bid was erroneously based upon non-representative cross-sections on the contract drawings, and petitioner should have recognized the scope of work to be done on the seaward side, *ibid.*; (iii) petitioner should have discovered any discrepancy through a site visit, and the contract provided that petitioner was assuming such risk, *id.* at 42; and (iv) petitioner's claim of resulting increased costs failed for lack of proof, *id.* at 44.

31, 33-35, 52, 54, 56, are misdirected. The ENGBCA expressly stated:

> The termination of the contract for convenience limits the significance of the Board's findings as to the acceptability of the work actually performed by [petitioner]. Although the Board has found that the Government was correct to the extent that it rejected [certain work,] [petitioner] nevertheless became entitled to payment for that work by virtue of the termination and the consequent requirement that [petitioner] be paid the total of its allowable costs under the contract, plus a fair and reasonable profit and settlement costs.

Pet. App. 37. The ENGBCA further explained that it was "leav[ing] the profit allowance unchanged," *id.* at 124, and not "attempt[ing] to reduce [petitioner's] recovery on the basis of a loss contract. Again, we leave the Contracting Officer's generous treatment of [petitioner] unchanged." *Id.* at 125.

Thus, even though it is clear that petitioner was in a loss position on this contract, the ENGBCA left the Contracting Officer's profit allowance intact. Petitioner was not denied recovery of any of its costs on the basis of its unsatisfactory performance.

2. Finally, the ENGBCA's use of actual evidence of equipment costs, rather than estimated figures, was fully consistent with the contract and with established principles of proof.

a. Petitioner argues that Clause SP-33 mandates the use of estimates here because certain of its costs were not allocable to specific pieces of equipment. Pet. 35-49. As a factual matter, however, the ENGBCA found that accurate, aggregate equipment

costs *were* ascertainable from petitioner's records, *e.g.*, Pet. App. 103, 104, and that application of the estimated cost schedule identified in SP-33 would not have increased petitioner's compensation, *id.* at 60-61, 105-106. Moreover, the law and the language of the contract clause itself express an unmistakable preference for actual cost evidence. *E.g.*, *Dawco Constr., Inc.* v. *United States*, 930 F.2d 872, 881 (Fed. Cir. 1991); *Meva Corp.* v. *United States*, 511 F.2d 548, 559 (Ct. Cl. 1975).

b. Petitioner further claims that it is entitled to recover opportunity costs it incurred by keeping this equipment idle during the post-termination period. Pet. 44. The ENGBCA recognized that a contractor may recover under a "standby claim" where "the contractor has been deprived of the productive use of its equipment by being compelled by circumstances for which the Government is responsible to keep the equipment idle." Pet. App. 108 (quoting *In re Lionsgate Corp.*, 91-2 BCA ¶ 24,008, at 120,163 (ENG BCA 1991)). The ENGBCA concluded, however, that petitioner "has not proved that there was any such standby." *Id.* at 109. This fact-based determination does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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